

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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In re:

Chapter 11

**RANDALL'S ISLAND FAMILY
GOLF CENTERS, INC., et al.,**

Case Nos. 00-41065
through 00-41196 (SMB)

Debtors.

(Jointly Administered)

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**MEMORANDUM OF LAW IN SUPPORT OF
MOTION OF TRINITY MILLS-MIDWAY PARTNERS, LTD.
FOR ORDER PURSUANT TO § 362(d) OF THE
BANKRUPTCY CODE VACATING THE AUTOMATIC STAY**

Trinity Mills-Midway Partners, Ltd. (“Trinity Mills”), by its co-counsel, Blank Rome Tenzer Greenblatt LLP and Hughes & Luce, L.L.P., respectfully submits this memorandum of law in support of its accompanying motion (the “Motion”) for entry of an order pursuant to § 362(d) of the Bankruptcy Code vacating the automatic stay to permit it to proceed with a pending state court eviction proceeding against GBGC Family Golf Centers, Inc., one of the Debtors herein (the “Debtor”).¹

FACTS

The relevant facts are set forth in the Motion, to which this Court is respectfully referred, and are incorporated herein by reference. Unless otherwise defined, capitalized terms utilized herein shall have the meanings ascribed to them in the Motion.

¹ GBGC Family Golf Centers, Inc. was formerly known as Golden Bear Golf Centers, Inc., the nominal tenant under the Ground Lease.

SUMMARY OF ARGUMENT

The Ground Lease between Trinity Mills, as landlord, and the Debtor, as tenant, was validly terminated pre-petition in accordance with the terms of the Ground Lease and applicable Texas state law. Since a bankruptcy court may not resurrect a lease that terminated prior to the filing of the bankruptcy case, the Ground Lease is incapable of assumption by the Debtor. The Debtor's inability to assume the Ground Lease constitutes cause for relief from the automatic stay to permit Trinity Mills to proceed with its state court eviction proceeding against the Debtor.

ARGUMENT

CAUSE EXISTS TO GRANT TRINITY MILLS RELIEF FROM THE AUTOMATIC STAY PURSUANT TO SECTION 362(d)(1) OF THE BANKRUPTCY CODE

Section 362(d) of the Bankruptcy Code provides, in pertinent part, that:

[o]n request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying or conditioning such stay –

(1) for cause, including the lack of adequate protection of an interest in property of such party in interest.

11 U.S.C. § 362(d)(1) (emphasis added).

The Ground Lease Terminated Pre-Petition

Whether the Ground Lease was properly terminated pre-petition is a question of Texas state law. See Lifshutz v. Trang (In re Trang), 58 B.R. 183, 187 (Bankr. S.D. Tex. 1985). The Supreme Court of Texas has stated:

In construing a lease, it is the Court's task to seek the intention of the parties as that intention is expressed in the lease. The Court will enforce an unambiguous instrument as written; and in the ordinary case, the writing alone will be deemed to express the intention of the parties.

Id. (quoting Sun Oil Co. v. Madeley, 626 S.W. 2d 726, 727-28 (Tex. 1981) and citing Rutherford v. Randal, 593 S.W. 2d 949 (Tex. 1980)). In the case at bar, the provisions of the Ground Lease respecting default and termination are unambiguous and should be enforced as written.

As set forth in detail in the Motion, after one year of notices of default under the Ground Lease, in accordance with Article 19, paragraph 19.2 thereof, the Ground Lease was terminated pursuant to the Notice of Lease Termination dated March 30, 2000 (the “Termination Notice”) sent by Trinity Mills to the Debtor. Paragraph 19.2 of the Ground Lease provides that in the event of any default by the Debtor, in addition to any other available remedies at law or in equity, Trinity Mills shall have the immediate option to terminate the Ground Lease and all rights of the Debtor thereunder by giving written notice of such intention to terminate. The Termination Notice states that Trinity Mills elected to terminate the Ground Lease “effective immediately.” Thus, the Debtor’s interest in the Ground Lease terminated immediately (on March 30, 2000) in accordance with the terms of the Ground Lease and the Termination Notice.

The Trang case and Casa El Sol-Acapulco, S.A. v. Fontenot, 919 S.W. 2d 709 (Tex. App. 1996), are instructive. In Trang, the lease provided that the lessor may terminate the lease upon the happening of any one of five events. The lessor followed the procedure for terminating the lease by sending a notice of termination in light of the debtor/lessee’s default and the lease terminated 15 days thereafter when the debtor/lessee did not cure the default. See 58 B.R. at 187. In Casa El Sol, the court held that a lease was properly terminated by the landlord where (a) the lease stated that, in the event of a default, the landlord had the option, without notice or demand, to terminate the lease, (b) the lessees failed to cure a default under the lease within 10 days (as provided by the lease), and (c) the landlord thereafter sent a letter to the lessee terminating the lease. See 919 S.W. 2d at 719; see also In re Cohoes Indus. Terminal, Inc., 70

B.R. 214, 219 (S.D.N.Y. 1986), aff'd, 831 F.2d 283 (2d Cir. 1987) (“Under the terms of the lease, the Debtor’s interest in the property ceased at [the time the termination notice became effective] and the Debtor was required to quit the property”).

The Trang court rejected the debtor’s argument that Texas law requires a lessor to terminate a lease by judicial process, stating that “[t]here is no such requirement in Texas for commercial leases.” 58 B.R. at 188. The Trang court also rejected the debtor’s argument that a lessor must re-enter the premises in order to terminate a lease. See id. at 187.²

The Termination Notice transformed the Debtor into a tenant at sufferance under Texas law. See id. at 188; Bockelmann v. Marynick, 788 S.W. 2d 569, 571 (Tex. 1990) (“[a] tenant who remains in possession of the premises after termination of the lease occupies ‘wrongfully’ and is said to have a tenancy at sufferance”); Goggins v. Leo, 849 S.W. 2d 373, 377 (Tex. App. 1993) (“[a] tenant at sufferance does not have privity with the landlord but is merely an occupant in naked possession after his right to possession has ceased”).

In Trang, although the court determined that the debtor therein had no legal interest in the premises at the time of commencement of the bankruptcy case, the debtor was in possession of the premises at such time. 58 B.R. at 188. Although the debtor’s possession as a tenant at sufferance has been determined to be an equitable interest under § 541 of the Bankruptcy Code entitled to protection by the automatic stay, the Trang court noted that “[t]he automatic stay gives only limited and temporary protection to this equitable interest. It will be lifted ‘for cause’ if the

² The Trang court noted that even if re-entry was necessary to terminate a lease, the lessor therein effectively re-entered by filing a counterclaim against the debtor/lessee in a pre-petition state court action seeking possession of the premises, stating that “[c]ase law holds that the institution of a lawsuit to obtain possession of land is deemed the equivalent of re-entry”. Id. at 187-88. Here, under the rationale of Trang, even if re-entry was required, Trinity Mills would have satisfied the requirement by filing the forcible entry and detainer action on May 3, 2000.

debtor cannot satisfy the requirements of § 362(d).” Id. (emphasis added) (citing In re Maxwell, 40 B.R. 231, 237 (N.D. Ill. 1984); In re Darwin, 22 B.R. 259, 264-65 (Bankr. E.D.N.Y. 1982)).³

The Ground Lease Cannot Be Assumed

The debtor in Trang moved to continue the automatic stay and reinstate the leases. 58 B.R. at 189. The Trang court concluded that reinstitution of the automatic stay was inappropriate because mere possession by a debtor/tenant at sufferance does not give the debtor the ability to assume a lease that terminated pre-petition:

It is well settled law that the debtor cannot assume leases that do not exist. Even though [the debtor] had an equitable interest in the premises when the bankruptcy petition was filed, the law is quite clear that “the fact that the automatic stay gives limited and temporary protection to a holdover tenant-debtor, based solely on naked possession, does not mean that there is a viable executory contract which the debtor may assume ...” (citations omitted). The limited equitable interest of the debtor “has absolutely no bearing on the continued viability of the lease.”

Id. (citations omitted).

A bankruptcy court does not have the power to resurrect a lease that terminated prior to the filing of a bankruptcy case. Id. (citations omitted); Bell v. Alden Owners, Inc., 199 B.R. 451, 458 (S.D.N.Y. 1996) (“The filing of a bankruptcy petition does not resurrect a lease, and a bankruptcy court does not have power to resurrect a lease which was terminated prior to the filing of the lessee’s bankruptcy petition”). Therefore, when a lease terminates prior to bankruptcy, so does a debtor’s right to assume the lease. See Trang, 58 B.R. at 189.

As the District Court (for this District) in Bell stated:

A debtor’s interest in an unexpired lease constitutes property of the bankruptcy estate pursuant to section 541 of the Bankruptcy Code

³ In Trang, the equitable interest of the debtor was forfeited and the automatic stay was terminated by operation of law pursuant to § 362(e) of the Bankruptcy Code when no preliminary hearing on the request for relief from the automatic stay was held within 30 days. 58 B.R. at 188.

and under Code section 365, a debtor has the right to assume or reject its unexpired leases. Once a lease is terminated, however, nothing remains for a debtor to assume under section 365.

199 B.R. at 462 (emphasis added) (citing In re GSVC Restaurant Corp., 3 B.R. 491 (Bankr. S.D.N.Y.), aff'd, 10 B.R. 300 (S.D.N.Y. 1980); In re Autobahn Classics, Inc., 29 B.R. 625, 627 (Bankr. S.D.N.Y. 1983)).

The Debtor's Inability To Assume The Ground Lease Constitutes Cause For Relief From The Automatic Stay

The Bell court further stated that:

This Court has recognized that a debtor's inability to assume a lease constitutes "cause" for relief from the automatic stay under Bankruptcy Code section 362(d)(1). Other jurisdictions have agreed.

199 B.R. at 462 (emphasis added) (citing In re Acorn Investments, 8 B.R. 506 (Bankr. S.D. Cal. 1981); In re Andorra Meat Market, Inc., 7 B.R. 744 (Bankr. E.D. Pa. 1980); In re R.R.S., Inc., 7 B.R. 870 (Bankr. M.D. Fla. 1980)). In sum, a lease which is validly terminated pre-petition may not be assumed by the debtor/tenant, and such inability to assume constitutes cause for relief from the automatic stay.

In the case at bar, as set forth in detail above and in the Motion, the Ground Lease was validly terminated pre-petition and thus is not property of the Debtor's estate. See Bell 199 B.R. at 463 (executory contract or lease validly terminated prior to institution of bankruptcy proceedings is not resurrected by filing of bankruptcy petition and cannot therefore be included among debtor's assets). Accordingly, the Ground Lease is incapable of assumption by the Debtor and cause exists for relief from the automatic stay to permit Trinity Mills to proceed with its forcible entry and detainer action. See id. at 462, 465 (district court affirmed bankruptcy court decision granting relief from automatic stay pre-petition where lease was validly terminated prior to commencement of bankruptcy case and thus could not be assumed); see also

In re Seven Stars Restaurant, Inc., 122 B.R. 213, 218 (Bankr. S.D.N.Y. 1990) (granting relief from automatic stay for cause to permit landlord to pursue state court action for order of eviction where landlord terminated lease pre-petition in accordance with its terms); Court v. Nasir (In re Nasir), 217 B.R. 995, 997-98 (Bankr. E.D. Va. 1997) (landlord's desire to evict debtor/tenant whose lease had been terminated pre-petition was sufficient cause to grant relief from automatic stay to permit landlord to pursue rights to recover property under state law); In re Gromyko, Inc., 142 B.R. 20, 21 (Bankr. D.R.I. 1992) (granting lessor's motion for relief from automatic stay to continue pre-petition eviction proceedings in state court against holdover tenant).

Conclusion

For the reasons set forth herein and in the Motion, Trinity Mills respectfully requests that the Motion be granted in its entirety and that Trinity Mills be granted such other and further relief as this Court deems just and proper.

Dated: New York, New York
June 23, 2000

Respectfully Submitted,

BLANK ROME TENZER GREENBLATT LLP
Co-Counsel to Trinity Mills-Midway Partners, Ltd.

By: _____
Andrew B. Eckstein (AE-6142)
A Member of the Firm
405 Lexington Avenue
New York, NY 10174
(212) 885-5000

-and-

HUGHES & LUCE, L.L.P.
Co-Counsel to Trinity Mills-Midway Partners, Ltd.
1717 Main Street, Suite 2800
Dallas, Texas 75201
(214) 939-5500

